LONE MOUNTAIN PRODUCTION CO.

IBLA 94-271 Decided July 2, 1997

Appeal from a Decision of the Utah State Office, Bureau of Land Management, affirming a Decision of the Moab District Office returning unapproved a Sundry Notice requesting approval for the off-lease beneficial, use of Federal lease gas. SDR No. 94-3.

Affirmed.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties

A BLM decision returning unapproved a Sundry Notice requesting a determination that use of Federal lease gas to fuel an off-lease, third-party compressor serving numerous wells and Federal leases should be considered royalty-free, beneficial use will be affirmed where appellant fails to demonstrate error in that decision.

APPEARANCES: Hugh V. Schaefer, Esq., Denver, Colorado, for Appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Lone Mountain Production Company (Lone Mountain) has appealed from the December 14, 1993, Decision of the Deputy State Director, Mineral Resources, Utah State Office, Bureau of Land Management (BLM or the Bureau), affirming the November 29, 1993, Decision of the Associate District Manager, Moab District Office, BLM, returning unapproved a Sundry Notice requesting approval for the off-lease beneficial-use of Federal lease gas pursuant to Notice to Lessees and Operators No. 4A (NTL-4A), 44 Fed. Reg. 76600 (Dec. 27, 1979).

Lone Mountain operates numerous gas wells in the Bar-X, State Line, and San Arroyo areas of Grand County, Utah, which it has connected, along with wells owned by Burton W. Hancock, in a low-pressure gas-gathering system. Lone Mountain measures the gas at the wellhead of each of the 34 Federal and 6 state wells, after which the gas proceeds to a third-party compressor and high-pressure gas system. Following compression, the gas is dehydrated and delivered to Northwest Pipeline through a purchase meter. Lone Mountain provides the fuel for the third-party compressor and intends to allocate the compressor fuel to each individual well based on the wellhead production volume.

Lone Mountain filed the Sundry Notice seeking the beneficial-use approval on October 18, 1993. Lone Mountain contended that, because most of the wells had been producing for over 10 years and needed low pressures in order to produce, the fuel for the third-party compressor benefitted the leases served by the low pressure gathering system and should not be subject to royalty.

Lone Mountain explained:

> Compression is necessary for the wells to produce into a low pressure system. Without either wellhead or field wide compression there would be no production from these low pressure wells. Compression is thus a necessary event to place the gas in a marketable condition and is therefore a beneficial use of lease gas.
>
> The installation of field wide compression results in a much lower total operating cost compared to individual wellhead compression, thereby benefitting the leases by extending the economic life and thus recoverable reserves from the individual wells.
>
> Large horsepower compressors used in field wide compression are much more efficient than small horsepower compressors used for individual wellhead compression. Total fuel usage per [thousand cubic feet] produced will thus be less, benefitting the leases by resulting in more gas sold.
>
> A precedent for off lease beneficial use of lease gas produced from Federal lands has been established in Campbell County, Wyoming, by approval of a Sundry Notice submitted by BWAB, Inc. Lone Mountain hereby suggests our request for beneficial use is under very similar circumstances and should therefore be approved. A copy of the relevant BWAB submittal and information is attached. Lone Mountain is not aware of any such submittals in Utah to date.

(Attachment to Sundry Notice at 2.) Lone Mountain appended copies of BWAB's Sundry Notice and a September 23, 1992, memorandum from the Deputy State Director, Wyoming State Office, BLM, to the Casper District Manager, approving BWAB's use of lease gas royalty-free to operate a compressor located off-lease and downstream from the sales meter and finding that, under Wyoming Informational Notice No. 91-1, Change 2, no royalty was due even though a third-party contractor owned and operated the compressor.

By Decision dated November 29, 1993, the Associate District Manager, Moab District Office, BLM, returned Lone Mountain's Sundry Notice unapproved, stating:

> [BLM's] responsibility for proper accounting of the oil and gas produced from jurisdictional leases ceases once the production is last measured before leaving the leasehold, except where off-lease measurement is approved. Once the gas is measured, it becomes the responsibility of the Minerals Management Service (MMS). In the instant case, off-lease measurement is not approved and is probably not justifiable.
>
> Although compression is considered a beneficial use under [NTL-4A], it must take place before being measured, which is not the case here. Off-lease beneficial use of lease gas is allowed under NTL-4A only when off-lease measurement has been approved.
>
> We agree that your situation is very similar to the case in Wyoming. However, we do not agree with the conclusions made in the September 23, 1992, memorandum from the Wyoming BLM, Deputy State Director, Mineral Resources to the Casper District Manager. In our opinion, it was contrary to Bureau guidance to conclude that it does not make any difference that the compressor is located off-lease and downstream of the sales meter.
>
> We realize that it is more economic to operate one large compressor rather than a small one on each lease, and we agree that such compression is a benefit to the leases involved. Although we have determined that your proposal is beyond the jurisdiction of BLM, it is within the purview of MMS, and they may be able to provide some relief. The MMS regulations at 30 CFR 206.151 provide for a transportation allowance for actual expenses incurred to transport the gas. We recommend you contact them to see if a transportation allowance is appropriate for this situation.

(Associate District Manager's Decision at 1-2.)

Lone Mountain sought State Director review of the Associate District Manager's Decision in accordance with 43 C.F.R. § 3165.3, arguing that the Wyoming BLM Decision should be accorded precedential value, and that the beneficial-use proposal comported with the intent of 30 C.F.R. § 202.150(b)(1) and NTL-4A.

In his December 14, 1993, Decision affirming the Associate District Manager's Decision, the Deputy State Director rejected Lone Mountain's contention that the Wyoming BLM memorandum set a precedent that the Utah BLM was obligated to follow. He stated that, while each BLM State Office had the authority to develop policies, consistent with BLM Washington Office dictates, to address specific situations in the respective states, policies established in one state were not binding on other states. After

evaluating the Wyoming approach, the Deputy State Director found it inapplicable since Lone Mountain's beneficial use was occurring off-lease.

The Deputy State Director concluded that the authority to issue a decision on beneficial use in this particular situation did not lie with BLM. In so doing, he quoted Washington Office Instruction Memorandum (IM) No. 90-474, dated May 11, 1990, which established that

> BLM's responsibility for the proper accounting of the oil and gas produced from jurisdictional leases ceases once the production is last measured before leaving the leasehold (except where off-lease measurement is approved) but not past an inlet meter for a gas processing plant. The determination of royalty-free use of production and the avoidability/unavoidability of loss of production also ceases at this point. Thereafter, MMS is responsible * * *.

(IM No. 90-474, at 2).

The Deputy State Director noted that the BLM-accepted point of measurement for all the involved wells defaulted to the on-lease meters since off-lease measurement had not been approved. He therefore determined that the Associate District Manager's actions conformed to BLM policy and affirmed the Decision to return Lone Mountain's Sundry Notice unapproved. He also suggested that Lone Mountain pursue the possibility of transportation and/or processing allowances through MMS.

On appeal, Lone Mountain challenges BLM's focus on the lack of approved off-lease measurement. 1/ Lone Mountain denies that off-lease beneficial use of gas is permissible only if off-lease measurement has been approved, citing NTL-4A's failure to require on-lease metering for gas used for beneficial purposes. Lone Mountain further contends that summary rejection of a request for off-lease beneficial use solely because

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1/ Lone Mountain argues that the Associate District Manager erroneously treated the Sundry Notice as a request for approval of both beneficial use and off-lease measurement despite the fact that Lone Mountain did not ask for off-lease measurement authorization or submit any information to support such a request. Lone Mountain interprets the Associate District Manager's statement that "[i]n the instant case, off-lease measurement is not approved and is probably not justifiable," as a denial of the purported off-lease measurement application. We construe this language as simply a description of the status quo, i.e., that off-lease measurement for the affected leases has not been approved, not as a decision on the permissibility of off-lease measurement. We also consider the Associate District Manager's comment that such measurement "is probably not justifiable" as simple dictum with no import should Lone Mountain seek off-lease measurement approval in the future.

the benefits occur off-lease conflicts with Board precedent directing that the appropriate agency consider individual circumstances before rendering a decision on beneficial use.

Lone Mountain objects to BLM's attempt to shift the responsibility for the beneficial-use determination to MMS simply because the gas is measured before leaving the leasehold. While conceding that the division of authority may be appropriate as far as intra-departmental jurisdiction is concerned, Lone Mountain asserts that this apportionment has no bearing on whether gas usage qualifies as beneficial use. Lone Mountain avers that, not only do BLM regulations fail to divest BLM of the power to render off-lease, beneficial-use determinations, but MMS regulations specifically provide that all onshore, beneficial-use determinations fall within BLM's purview. Lone Mountain cites the preamble to the 1988 revised royalty valuation regulations, 53 Fed. Reg. 1230, 1233 (Jan. 15, 1988), as support for BLM's obligation to evaluate beneficial-use applications.

Lone Mountain denies that IM No. 90-47 precludes BLM from examining the beneficial-use request, especially since neither NTL-4A nor Board precedent places the beneficial-use Decision in MMS' hands after gas leaves an onshore Federal lease. Lone Mountain points out that the IM expired by its own terms on September 30, 1991, and BLM has not indicated whether the IM has been incorporated into the BLM Manual. Lone Mountain argues that, in any event, the IM does not have the force and effect of law or bind the Board, which remains free to consider whether application of the IM is arbitrary, capricious, an abuse of discretion, or contrary to law. Lone Mountain again submits that the policy adopted by the Wyoming State Office, BLM, allowing royalty-free use of lease gas to operate an off-lease, third-party compressor comports with NTL-4A and Board precedent and should be applied here. Because BLM's Decision in this case conflicts with Departmental policy and controlling legal precedent, Lone Mountain asks that the Decision be reversed.

[1] NTL-4A exempts from royalty obligations any produced gas "used on the same lease, same communitized tract, or same unit participating area for beneficial purposes." 44 Fed. Reg. 76600 (Dec. 27, 1979). "Beneficial purposes" is defined in relevant part as

> gas which is produced from a lease, communitized tract, or unit participating area and which is used on or for the benefit of that same lease, same communitized tract, or same unit participating area for operating or producing purposes such as * * * (3) fuel in compressing gas for the purpose of placing it in a marketable condition.

Id.

The Bureau does not dispute that the lease gas used to fuel the off-lease, third-party compressor benefits the leases involved. Instead, BLM bases its Decision to return unapproved Lone Mountain's Sundry Notice

seeking BLM's consent to royalty-free use of lease gas for the compressor on its conclusion that, under IM No. 90-474, MMS had responsibility for the proper accounting of the lease gas once it was last measured on the leasehold.

The IM's issued by BLM do not, as a general matter, have the force and effect of law and are not binding on the Board, which will decline to follow them where they are inconsistent with the terms of relevant regulations. Atlantic Richfield Co., 121 IBLA 373, 380, 98 Interior Dec. 429, 432-33 (1991). Employees of BLM are nevertheless obligated to follow the terms of an IM. See Beard Oil Co., 105 IBLA 285, 288 (1988). Furthermore, where BLM adopts agency-wide procedures that are reasonable and consistent with the law, the Board will not hesitate to follow those procedures and require their enforcement. See Atlantic Richfield Co., 121 IBLA at 380, 98 Interior Dec. at 433; Beard Oil Co., supra. A party challenging a BLM decision applying an IM has the burden of demonstrating error by the preponderance of the evidence. See C.C. Co., 132 IBLA 210, 214 (1995); Animal Protection Institute of America, 118 IBLA 63, 71 (1991).

The IM No. 90-474, upon which BLM relies, specifies that BLM's gas accounting responsibility ends once the production is last measured before leaving the leasehold, unless off-lease measurement has been approved, and that BLM's determination of royalty-free use of production also ceases at this point. Authority for production-related decisions then transfers to MMS, which was consulted prior to issuance of the IM. See IM No. 90-474 at 2. Lone Mountain acknowledges that it has neither sought nor received approval of off-lease measurement for the affected leases and that gas production from the leases is measured on the leases. Thus, under the IM, Lone Mountain's beneficial-use request falls outside BLM's jurisdiction.

Although neither NTL-4A nor Departmental precedent precludes BLM from exercising authority over off-lease, beneficial-use determinations, those authorities also do not compel BLM to shoulder that responsibility. Thus, IM No. 90-474 does not conflict with NTL-4A or Board decisions. The preamble to MMS' January 15, 1988, revised royalty valuation regulations cited by Lone Mountain does not undermine the validity of IM No. 90-474, which was issued over 2 years after publication of the preamble, since the preamble was not part of the regulations and did not purport to prevent BLM from defining the limits of its authority. Nor does the fact that the IM, which indicates that it will be included in the future Manual on Production Handling and Site Security, bears an expiration date of September 30, 1991, render it inapplicable, absent evidence that it has been superseded or no longer reflects BLM's policy on beneficial-use determinations. See Kanawha & Hocking Coal & Coke Co., 118 IBLA 364, 369 n.4 (1991). Furthermore, while Lone Mountain prefers the policy

espoused by the Wyoming State Office, Wyoming Informational Notice No. 91-1, Change 2, by its own terms, applies only to oil and gas leases within the jurisdiction of the Wyoming State Office and does not profess to bind the Utah State Office.

If an appellant fails to show error in the appealed decision, the decision will be affirmed. Charles S. Stoll, 137 IBLA 116, 126 (1996). We find that Lone Mountain has not established that BLM erred in returning the Sundry Notice unapproved and affirm BLM's Decision. We note, however, that our affirmance of BLM's Decision should not be construed as a finding that Lone Mountain's beneficial-use request should be rejected, but simply as a determination that BLM properly declined approval responsibility for that request.

To the extent not specifically addressed herein, Lone Mountain's arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge